UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

JAMES I. WYNN, SR., **CASE NO. 94-22611**

Debtor(s). **DECISION & ORDER**

BACKGROUND

On December 5, 1994, James I. Wynn, Sr. (the "Debtor") filed a petition initiating a Chapter 13 case. On his Schedule A of Real Property the Debtor showed that: (1) he owned eight investment properties in the City of Rochester, including a two-family income property at 183 Wellington Avenue ("Wellington Avenue"), two vacant lots in a suburban township, and a residence at 7 Kencrest Circle, Rochester, New York ("Kencrest"); and (2) he believed that these parcels of real property had an aggregate value of $760,000.00 and were subject to unpaid mortgages and real estate taxes with an aggregate balance of approximately $520,000.00.

Along with his petition, the Debtor filed a Chapter 13 Plan (the "Plan") in which the Debtor proposed to: (1) pay the Trustee $50.00 per month from his disposable income of approximately $75.00 per month (the Debtor's income is primarily pension and rental income); and (2) sell within two years (by January 30, 1997) various of his investment properties and use the proceeds to pay in full his unpaid mortgage arrearages, mortgages on sold properties, real estate taxes, unsecured creditors, estimated at approximately $8,500.00, administrative expenses and Trustee commissions.

At a confirmation hearing conducted on January 30, 1995, the Court confirmed the Plan conditioned upon: (1) the Debtor using all income generated from each individual investment

property for the expenses of that property until the property was sold or the Plan completed; (2) unsecured creditors, who were to receive payment in full plus a 9% value added factor because of the estimated non-exempt equity in the Debtor's assets, were to be paid first out of any unsecured proceeds of individual property sales before secured creditors with liens on other properties; and (3) the Debtor was to provide proof of insurance on all of the properties before an order of confirmation would be entered. On May 18, 1995, an Order Confirming the Plan was entered.

On May 18, 1995, the Chapter 13 Trustee ("Trustee") filed a motion (the "Modification Motion"), pursuant to Section 1329[1], to increase the Debtor's plan payments by the proceeds of the settlement of a discrimination action (the "Discrimination Suit") brought by the Debtor against his former employer, A.C. Delco Systems ("Delco"), then pending in the United States District Court for the Western District of New York (the "District Court"). The Motion indicated that: (1) the

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[1] Section 1329 (a) provides:

> At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to–
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> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
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> (2) extend or reduce the time for such payments; or
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> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

Debtor was the plaintiff in the pending Discrimination Suit; (2) with the approval of the District Court the Suit had been settled for $54,000.00 with the approval of the District Court; (3) the settlement was being held in escrow by the attorneys for Delco; (4) the Debtor had not disclosed the Discrimination Suit or the settlement in his schedules or at his Section 341 Meeting of Creditors; (5) the Debtor's attorney in the Discrimination Suit was not his bankruptcy attorney, and in late March, 1995 his bankruptcy attorney had been suspended from the practice of law; (6) the Debtor had appealed to the United States Court of Appeals for the Second Circuit (the "Second Circuit") the denial of his request to the District Court that it vacate the settlement; (7) the Debtor's attorney in the Discrimination Suit had a claim to a contingent fee based upon the settlement; (8) the net proceeds of the settlement of the Discrimination Suit would allow the general and priority unsecured creditors to be paid immediately in full with a value added factor and also allow a substantial payment to be made towards the secured claims to be paid under the Plan. Therefore, the Trustee requested that the Plan be modified to provide for the payment to the Trustee of the proceeds of the settlement of the Discrimination Suit, after the deduction for attorney's fees and expenses in prosecuting the Suit. On June 14, 1995, the Debtor, who since his bankruptcy attorney was suspended from the practice of law has been prosecuting his Chapter 13 case "pro se", interposed a Response to the Modification Motion which indicated that: (1) he believed from his former bankruptcy attorney that the Court was aware of the settlement and that the settlement funds were being held in escrow by the attorneys for Delco; (2) he had appealed the denial by the District Court of his request to vacate the Court approved settlement because he no longer agreed with the

settlement; and (3) he did not wish the Bankruptcy Court to modify the Plan as proposed by the Trustee.

At the return date of the Modification Motion on June 19, 1995, the Court granted the Motion, contingent on the Debtor's appeal to the Second Circuit being denied or dismissed. On August 28, 1995, after the Debtor's appeal to the Second Circuit had been denied, the Court entered an Order modifying the Plan (the "Modification Order"). The Order directed that the net proceeds of the settlement of the Discrimination Suit be turned over to the Trustee for distribution first to pay general unsecured claims, which were to be paid in full plus a value-added factor of 9%, next to pay priority claims in full plus a value-added factor of 9% and then to pay all or a portion of the secured claims to be paid under the Modified Plan.

By motion (the "Turnover Motion"), made returnable on September 6, 1995, the Trustee requested that the Court enter an Order: (1) directing that the settlement proceeds of the Discrimination Suit being held in escrow by the attorneys for Delco be paid over to him, as Trustee; (2) authorizing him, as Trustee, to pay $14,000.00 from the proceeds to the Debtor's attorney in the Suit, which was the balance of her contingent fee; and (3) directing the Trustee to distribute the remaining proceeds pursuant to the terms of the Modified Plan. By letter dated September 1, 1995, the Debtor advised the Court in response to the Turnover Motion that he had applied for a rehearing before the Second Circuit and requested that the net proceeds of the settlement of the Discrimination Suit, if they were paid over to the Trustee, be distributed to him to pay his current bills, including various mortgage arrearages, rather than to unsecured creditors as required by the Modified Plan.

On the return date of the Turnover Motion the Court granted the Motion but directed that the turnover of the settlement proceeds would be contingent upon the denial of the Debtor's application to the Second Circuit for a rehearing or the Second Circuit once again affirming the settlement if a rehearing was granted. An order was entered on September 26, 1995 (the "Turnover Order").

On October 19, 1995, Delco filed a motion (the "Delco Motion") which requested that the Turnover Order be amended. The Motion alleged that on or about September 1, 1995, in violation of the terms of the District Court approved settlement in the Discrimination Suit, the Debtor commenced a discrimination action in New York State Supreme Court. Thereafter, Delco filed a motion in the District Court which requested that the Court enforce the Court approved settlement. Delco requested that its attorneys not be required to turn over the settlement proceeds until a final order was entered by the District Court enforcing the settlement. On the November 1, 1995 return date of the Delco Motion, the attorneys for Delco also indicated that as part of the enforcement proceeding the District Court might award some of the settlement proceeds to Delco as damages. The Court granted the Delco Motion in part. It directed that there immediately be paid over to the Trustee so much of the settlement proceeds as he would require to pay the Debtor's attorney in the Discrimination Suit the balance due on her contingent fee and all general and priority unsecured creditors in full, as provided for under the Modified Plan. The Court determined in connection with its ruling that a sufficient amount would remain in escrow with the attorneys for Delco to cover any reasonable damages the District Court might award Delco. On December 14, 1995, an order was entered in connection with the Delco Motion (the "Amended Turnover Order").

On November 1, 1995, the Debtor filed a Notice of Appeal from the Court's August 28, 1995 Modification Order and September 26, 1995 Turnover Order. The appeal was dismissed on November 9, 1995 because of the failure of the Debtor to pay the required filing fee.

On December 28, 1995, the Debtor appealed the Amended Turnover Order to the District Court. No stay pending appeal was requested. Thereafter, the Trustee, pursuant to the Turnover and Amended Turnover Orders, received enough of the settlement proceeds so that in January, 1996 he was able to pay the general and priority unsecured creditors provided for under the Plan and the Modified Plan in full with a value added factor of 9%. On August 7, 1996, the appeal of the Amended Turnover Order was dismissed by the District Court.

From the date of the filing of the Debtor's Petition on December 5, 1994, through May 1, 1996, there were seven (7) motions to modify the stay provided by Section 362 filed by secured creditors with liens against one or more of the parcels of real property owned by the Debtor. These motions resulted in various orders being entered. However, no motions have been filed by the Debtor or the Trustee to approve the sale of any of the Debtor's parcels of real property.

On May 6, 1996, the Debtor filed a copy of his May 3, 1996 letter to the Trustee (the "Jackson Letter") wherein he attached a copy of a January 31, 1996 judgment in favor of Trenton J. and Pamela M. Jackson of 177 Wellington Avenue, Rochester, New York (the "Jacksons"), entered against him in the Rochester City Court (the "Jackson Judgment"). The Jackson Judgment was for the total amount of $7,372.73 and was signed by the Honorable Ann E. Pfeiffer ("Judge Pfeiffer"). The Jackson Letter indicated that: (1) on November 12, 1992, some bricks fell from the

chimney of the Debtor's 183 Wellington Avenue property and damaged the Jackson's adjoining property on Wellington Avenue; (2) the Debtor thought the matter was being resolved by his insurance company and the Jackson's insurance company, but then he was sued by the Jackson's attorney for a sum that was far in excess of what his insurance company had indicated to him the repairs would cost; and (3) executions on the Jackson Judgment had resulted in monies from the Debtor's checking account and rent checks from the Department of Social Services being paid over to Nationwide Insurance ("Nationwide") the then holder of the Jackson Judgment.

Thereafter, the Trustee filed a copy of his May 9, 1996 letter to the Debtor regarding the Jackson Letter and the Jackson Judgment which indicated that before executing against property of the estate, including monies in the Debtor's checking account and rent payments, the holder of the Jackson Judgment should have requested an order of the Bankruptcy Court granting it relief from the stay. In his letter, the Trustee acknowledged, however, that it appeared that the holder of the Jackson Judgment had not been made aware of the Debtor's bankruptcy before the initial enforcement proceedings had been undertaken.

On May 24, 1996, the Debtor filed a copy of his May 23, 1996 letter to Judge Pfeiffer in response to an Order which she had entered denying the Debtor's motions requesting relief from the restraining notices, garnishments and executions in connection with the Jackson Judgment.

On June 12, 1996, the Debtor filed a motion entitled "Violation of Debtor Chapter 13 Rights, Illegal Garnishee of Debtor Funds, Reimburse Debtor $4,912.00 Taken As a Result of Garnishee Plus Expenses and 50% Interest Monthly Starting March 12, 1996" (the "Enforcement Motion").

The Supporting Affidavit of the Debtor indicated that: (1) the Debtor had initially been served in the City Court action (the "Jackson Action") on March 7, 1995; (2) on July 26, 1995 Arbitrator Robert Michel[2] ("Arbitrator Michel"), after an arbitration proceeding in which the Debtor appeared and participated, made an award (the "Arbitration Award") to the Jacksons of $5,578.00 plus interest from July 26, 1995; (3) on August 28, 1995, the Debtor had demanded a trial *de novo* in City Court; (4) on January 5, 1996, Judge Pfeiffer conducted a trial, on January 17, 1996 issued a written decision and on January 31, 1996 signed the Jackson Judgment for $7,372.72; (5) prior to the entry of the Jackson Judgment on January 31, 1996, the Debtor had not indicated to the Jacksons, their attorney, Arbitrator Michel or Judge Pfeiffer that he was involved in a pending Chapter 13 case that had been filed on December 5, 1994; (6) on February 6, 1996, the Debtor appealed Judge Pfeiffer's Decision and the Jackson Judgment, but did not apply for a stay pending appeal; and (7) $4,912.00 had been obtained from the Debtor on executions which he requested be returned to him, along with $850.00, the out-of-pocket expenses he alleges that he incurred in connection with this matter.

On June 14, 1996, Nationwide interposed opposition to the Enforcement Motion. The Affidavit of Nationwide's attorney indicated that: (1) there was an appeal of the Pfeiffer Decision and the Jackson Judgment pending in State Court; (2) under New York Civil Practice Law and Rules (the "CPLR") Section 3211, by failing to include any discharge in bankruptcy as an affirmative

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[2] Robert Michel is an attorney and a several term elected Town Justice in the Town of Pittsford, New York.

defense, the Debtor had waived that defense[3]; (3) prior to May 6, 1996, the Debtor had never advised the parties in the Jackson Action of his pending bankruptcy proceeding; (4) had the other parties in the Jackson Action known of the Debtor's bankruptcy, they would have moved in Bankruptcy Court to be allowed to proceed in City Court; (5) Nationwide would be severely prejudiced if the expenses they had incurred in the various stages of litigation, including pleadings, discovery, arbitration, trial, enforcement, post-trial motions and the appeal, were invalidated because the Debtor purposefully failed to advise them of his bankruptcy; (6) the Court should equitably annul the automatic stay, either to the extent of the Judgment Creditor's actions taken to date, or until such time as the

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[3] CPLR Section 3211 provides in pertinent part:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds.

(e) Number, time and waiver of objections; motion to please over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more that one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading.

Jackson Judgment has been paid in full[4]; and (7) any violation of the stay by Nationwide or the Jacksons was not wilful, so that no award should be made pursuant to Section 362(h).

At the June 19, 1996 return date of the Enforcement Motion: (1) the Court learned for the first time that the Debtor had transferred title to at least three of his investment properties to his son in an attempt to avoid their being the subject of property executions in connection with the enforcement of the Jackson Judgment; (2) the Debtor advised the Court that he did not list the Jacksons as creditors on his bankruptcy schedules because between November, 1992, when the damages occurred, and March, 1995, when he was served in the Jackson Action, he believed that the matter was being taken care of by his insurance company; (3) the Debtor failed to ever satisfactorily explain why between March, 1995, when he was served in the Jackson Action, and April, 1996, when he alleges he first advised Judge Pfeiffer of his bankruptcy proceedings, he did not advise the Jacksons, their attorney, Arbitrator Michel, Judge Pfeiffer or the attorneys for Nationwide of his pending bankruptcy which has been a very time consuming matter for the Debtor; and (4) the Debtor failed to ever satisfactorily explain why between March, 1995 and May, 1996 he did not advise the Trustee or the Bankruptcy Court of the Jackson Action, especially between September, 1995, which was after the Arbitration Award, and January, 1996 in connection with the Turnover and Delco Motions, when the Debtor knew that all of his unsecured creditors like the Jacksons were going to be paid in full by the Trustee from the settlement proceeds of the Discrimination Suit. The Court

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[4] The Court has considered the Nationwide opposition to also be a cross-motion for relief from the stay under Section 362(d) (the "Stay Motion").

expressed to the Debtor its concern that the Jackson Judgment would have been paid in full along with the Debtor's other unsecured claims in January, 1996 if he had advised the Trustee and the Court of the Judgment, and adjourned the Enforcement Motion to July 17, 1996 in order to afford the Debtor the opportunity to negotiate with the attorneys for Nationwide to see if a satisfactory agreement could be entered into for the Debtor to pay of the balance due on the Jackson Judgment.

On the July 17, 1996 adjourned date of the Enforcement Motion, the Court was advised that no agreement had been reached for the payment of the balance due on the Jackson Judgment. The Court heard final arguments and allowed the parties until August 24, 1996 to file any optional submissions with the Court.

On September 20, 1996, the Court filed a Decision & Order (the "Jackson Order") which: (1) annulled the stay as to the Jackson Action and the enforcement of the Jackson Judgment to the date of the Order; (2) provided that Nationwide could retain the amounts collected through the date of the Order and apply them to the Jackson Judgment in accordance with New York State law; and (3) modified and conditioned the stay in a way the Court felt would ensure, to the extent possible, that the balance due on the Jackson Judgment, unless vacated on appeal, would be paid in full, while at the same time enforcing the stay going forward and affording the Debtor an opportunity to complete the Modified Plan as proposed and confirmed on January 30, 1995, which would result in the payoff of the balance due on the Jackson Judgment, if not otherwise paid as provided for in the Jackson Order.

On October 2, 1996, the Debtor filed a Notice appealing the Jackson Order.

As set forth above, between the date of the filing of the Debtor's Petition on December 5, 1994 and May 1, 1996, there were seven motions to modify the stay filed by secured creditors with liens against one or more of the parcels of real property owned by the Debtor. Between May 1, 1996 and September 20, 1996, there were three additional motions to modify the stay filed by secured creditors with liens against one or more of the parcels of real property owned by the Debtor. One of these motions (the "RCSB Motion") was filed by Rochester Community Savings Bank ("RCSB"), which holds a mortgage on 3840 Lake Avenue, Rochester, New York. The RCSB Motion was filed in accordance with the Court's default procedure for motions to modify the stay in Chapter 13 cases, and was made returnable on September 18, 1996 in the event that timely opposition was interposed. Even though the Debtor filed late opposition, the Court allowed him to be heard on September 18, 1996. At that time: (1) the Debtor admitted that he was not current on his post-petition mortgage payments when the RCSB Motion was filed; (2) it was agreed that the Debtor would make regular mortgage payments going forward plus one-half of a mortgage payment each month until the post-petition arrearages were paid in full; and (3) the Court granted RCSB's request for attorney's fees and costs incurred in connection with the RCSB Motion in the amounts the Court regularly awards as attorney's fees and costs to oversecured mortgage holders when a Debtor has failed to make post-petition mortgage payments.

On September 26, 1996 an Order was entered in connection with the RCSB Motion, and on October 7, 1996 the Debtor filed a Notice appealing the Order.

On November 1, 1995, Empire of America Realty Credit Corp. ("Empire") filed a motion

(the "Empire Motion") to modify the stay to permit it to foreclose its mortgage (the "Plymouth Avenue Mortgage") on the Debtor's real property located at 1069 South Plymouth Avenue, Rochester, New York ("Plymouth Avenue"). The Empire Motion was filed in accordance with the Court's default procedure. In the October 23, 1995 Affidavit of one of the attorneys for Empire and on the Cover Sheet required by the Court, the Motion alleged that: (1) the Debtor had not paid his post-petition mortgage payments for the months of March, 1995 through October, 1995; (2) the total post-petition arrearages were $8,326.26; and (3) the Debtor lacked equity in Plymouth Avenue. The Empire Motion was made returnable on November 15, 1995 in the event that timely opposition was interposed. The Debtor filed a November 9, 1995 letter in response to the Empire Motion which stated that:

> "I have made several payments this year at $885.18 monthly. My record shows that I am also in the arrears by several payments. I would like to know the exact amount from Empire of America because I do plan to make up the arrears payments. The reason it is in the arrears is it is a two family dwelling in a very bad neighborhood which makes it hard to rent or get tenants to pay when they rent. I have had one apartment vacant off and on all year. I have applied for my retirement pay. I expect to receive a lump sum of approximately $23,000.00 by the end of December, 1995. I am hereby requested that my stay be put off until December 30, 1995. This would give me a chance to receive my retirement check."

On the November 15, 1995 return date of the Empire Motion, at which the Debtor did not appear, the attorney appearing for Empire indicated that a conditional order would be submitted in response to the Debtor's November 9, 1995 letter which would provide that the Debtor would be required to pay the November and December, 1995 regular mortgage payments on or before the 22nd

day of those months, and then would have until December 31, 1995 to bring all post-petition arrearages current.

On December 5, 1995, the Court entered a Conditional Order submitted by the attorneys for Empire (the "Empire Order") which provided in one of its ordering paragraphs that:

> "ORDERED, ADJUDGED AND DECREED, that the debtor will pay the petitioner the November Mortgage payment by November 22, 1995 and the December Mortgage payment by December 22, 1995. In additional all post-petition Mortgage arrears from March, 1995 through October 1, 1995 in the amount of $1,326.26 be paid by December 30, 1995 together with petitioner's Attorney's fees in the amount of $250.00 and Disbursements in the amount of $60.00, and it is further..."

On July 29, 1996, Source One Mortgage Service Corp. ("Source One"), the assignee of Empire, filed a Motion to Correct Conditional Order (the "Source One Motion") which alleged that: (1) there had been an inadvertent typographical error in the Conditional Order when it stated that the total post-petition mortgage arrearages were $1,326.26 rather than the correct amount which was $8,326.26; and (2) an attached October 13, 1995 document labelled bankruptcy proof of claim (the "Empire Computation") correctly showed the computation of the $8,326.26 due as of that date. The Empire Computation showed eight payments of $1,005.59 as being due, along with seven late charges of $40.22, totaling $281.54, for a total amount due of $8,326.26.

On August 16, 1996, the Debtor filed an Affidavit in Opposition to the Source One Motion which alleged that: (1) on December 5, 1995, the Conditional Order was entered for $1,326.26 plus $250.00 in attorney's fees and $60.00 in disbursements, which was what Empire had submitted to the Court; (2) the $8,326.26 was put in to make it look like a typo; (3) Empire had sold the Debtor's mortgage to Source One which the Debtor started to pay on December 1, 1995; (4) the Debtor did

not have any intention of paying Empire any more than was ordered by the Court to be paid in the Conditional Order; (5) the Debtor did not have $7,000.00 to give Empire, and he did not owe them any more than he had already paid them; and (6) all of the receipts which Debtor had concerning his payments to Empire were destroyed in a flood in his basement.

At hearings conducted by the Court on August 21, September 4 and September 11, 1996: (1) the Court advised the parties that from its review of the pleadings, it appeared to the Court that the Conditional Order did contain an inadvertent typographical error, so that grounds appeared to exist for the Court to grant the Source One Motion in accordance with the provisions of Rule 60(b)(1) and Rule 60(b)(6) of the Federal Rules of Civil Procedure; (2) the Court expressed a concern that the arrearages claimed in the Empire Motion were correct because there appeared to be a discrepancy between the mortgage payments of $1,005.59 set forth in the Empire Computation, and the $885.18 mortgage payments the Debtor indicated he had been making in 1995; (3) the Debtor alleged that he had not missed all of the payments from March, 1995 through October, 1995, but had not pursued the matter further because of the amount of arrearages set forth in the Conditional Order; (4) the Court instructed the Debtor to obtain copies of proofs of mortgage payments made between March, 1995 and October, 1995 from the respective banks or issuers of money orders used to make the payments he alleged that he had made; and (5) the Court encouraged the parties to attempt to arrive at a settlement of this matter. On September 11, 1995, the Court scheduled a final hearing on the Source One Motion for October 10, 1996.

On October 9, 1996, the Debtor filed an additional Affidavit in Opposition to the Source One

Motion which alleged that: (1) Empire of America is no longer in business and it is not right by the law or accepted by Debtor/Defendant that Source One...defend Empire of America who is no longer in business; (2) the Debtor's monthly payment is $885.18, not $1,005.59 as indicated on the Empire Computation; (3) Source One is trying to get the Court to force the Debtor to pay for Empire of America's poor record-keeping; (4) the Empire Motion did not state or have attached what Debtor's arrears were or what the Debtor's monthly payments were; (5) the Debtor had a flood in his basement and the receipts for Empire of America were destroyed; and (6) in a conversation in the Fall of 1995 with the attorney for Empire, that attorney acknowledged that Empire did not know the correct amount of post-petition arrears due from the Debtor.

At the October 10, 1996 Evidentiary Hearing, the Court heard the testimony of the Debtor, William Kruse, a bankruptcy administrator from the principal office of Source One in Michigan ("Kruse"), and Ronald W. Zackem, Esq., the attorney for Empire and Source One who filed the Empire Motion and the Source One Motion ("Zackem").

DISCUSSION

At the commencement of the Evidentiary Hearing, Zackem, as the attorney for Source One, indicated that Source One now agreed and was willing to stipulate that: (1) the correct monthly mortgage payment due from the Debtor for principal, interest and escrow for the months of March, 1995 through October, 1995 was $885.18; (2) the correct monthly late charge due for any late or missed payment during that period was $35.41; and (3) at the time of the Empire Motion the total

arrearages due from the Debtor on the Plymouth Avenue Mortgage for the months of March, 1995 through October, 1995 was $7,329.31 ($7,081.44 representing eight payments of $885.18 and $246.87 representing seven late charges of $35.41).

At the Hearing, Kruse testified that the payment history records of Source One maintained in the ordinary course of its business (admitted into evidence as Plaintiff's Exhibit 1 at the Hearing), including the payment history records transferred to Source One by Empire when Source One acquired approximately 40,000 mortgages from Empire in December, 1995, indicated that: (1) the Debtor had made payments to Empire on the Plymouth Avenue Mortgage in the amount of $885.18 in January, 1995 and February, 1995, but neither Empire or Source One had received any other payments from the Debtor on the Plymouth Avenue Mortgage during the year 1995; (2) from January 1, 1996 through September 30, 1996, the Debtor had made $8,594.70 in mortgage payments to Source One, including a payment of $2,596.62 which Source One's payment history records indicated was received by it on January 30, 1996; and (3) the payment history records of Empire and Source One, after a detailed review by Kruse, indicated that the correct monthly mortgage payment for principal, interest and escrow due from the Debtor on the Plymouth Avenue Mortgage for the months of March, 1995 through October, 1995 was $885.18.

At the Hearing, the Debtor indicated to the Court that he was unable to obtain copies of any of the bank checks or money orders which he alleged that he had obtained and used to pay some of the monthly mortgage payments due on the Plymouth Avenue Mortgage for the months of March, 1995 through October, 1995. The Debtor also testified that he made the March, April, May and

June, 1995 payments, but could not say for certain that he made the July, August, September or October payments, although he believed that he was at most three post-petition mortgage payments in arrears in October, 1995 when he received the Empire Motion. As set forth in the Affidavits the Debtor filed in opposition to the Source One Motion, he testified that in the spring of 1996, his basement was flooded, which resulted in the destruction of many of his records, including his records of payments on the Plymouth Avenue Mortgage.

After hearing the testimony of the witnesses, judging their credibility and reviewing all of the pleadings, evidence and proceedings before me, I make the following findings of fact:

(1) The post-petition monthly mortgage payment due from the Debtor on the Plymouth Avenue Mortgage for the months of March, 1995 through October, 1995 was $885.18, representing principal, interest and escrow.[5]

(2) The late charge for a late or missed monthly mortgage payment for the post-petition payments due on the Plymouth Avenue Mortgage for the months of March, 1995 through October, 1995 was $35.41.

(3) The Debtor failed to make any of the post-petition mortgage payments due for the months of March, 1995 through October, 1995 prior to December 31, 1995.

(4) The total amount of arrearages due as principal, interest, escrow and late charges on the date of the entry of the Conditional Order on the Plymouth Avenue Mortgage for the months of March, 1995 through October, 1995 was $7,329.31.

(5) The provision in the Conditional Order that the post-petition mortgage arrearages were $1,326.26 rather than $8,326.26 was an inadvertent typographical error, however, as found above, the correct amount of the post-petition mortgage arrearages should have been $7,329.31.

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[5] The Debtor's November 9, 1995 letter acknowledged this to be his understanding of the amount of the monthly mortgage payment due.

At the Evidentiary Hearing, the Debtor testified that he was unable to obtain copies of bank checks from RCSB, the primary bank from which he testified he obtained bank checks for the payment of mortgages on his various properties. However, it does not appear to the Court that he made the kind of effort which would be expected to obtain these copies, especially since the Debtor has had since August, 1996 to obtain any such copies. Furthermore, the Court believes that these copies could have been obtained, if the checks in fact had been obtained by the Debtor in 1995 for the payments due on the Plymouth Avenue Mortgage. In this regard, the Court makes it clear to all Chapter 13 debtors at the time of their confirmation hearings that the Court has the expectation that they will be at all times able to provide proof that they made all of their post-petition mortgage payments to avoid exactly the kind of dispute presented in this matter. The Court reminded the Debtor of this expectation at the earlier hearings on the Source One Motion and advised him to obtain the necessary proof for the hearing on October 10, 1996.

The Conditional Order contained a further provisions which stated that:

> "ORDERED, ADJUDGED AND DECREED, that the Debtor will pay the petitioner all future monthly mortgage installments during the month that they are due, commencing with the installment payable on the 1st of January, 1996, and it is further,
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> ORDERED, ADJUDGED AND DECREED, that upon default of any payment due under the Order the petitioner may immediately begin or continue foreclosure action against the Debtor's interest in the aforementioned property without further leave of this Court."

CONCLUSION

Pursuant to Section 105 and Rules 60(b)(1) and 60(b)(6) of the Federal Rules of Civil Procedure, the Motion of Source One to Correct the Conditional Order is hereby granted, and the post-petition mortgage arrearages due from March, 1995 through October 1, 1995 are hereby determined to be in the amount of $7,329.31, rather than the $1,326.26 as set forth in the Conditional Order.

In order to prevent possible prejudice to the Debtor because of the inadvertent and unfortunate error in the Conditional Order, notwithstanding the provisions of the Conditional Order, the stay shall not be modified to permit Source One to begin or continue a mortgage foreclosure action against Plymouth Avenue for the failure of the Debtor to pay the correct amount of the post-petition mortgage arrearages due for the months of March, 1995 through October, 1995 unless the Debtor has failed to pay the now determined correct amount of these post-petition arrearages, $7,329.31, on or before January 30, 1997, when under the Modified Plan, all of his creditors, including all secured creditors, are to have been paid in full, or otherwise be brought current on their secured obligations.

Nothing in this Decision & Order, however, shall modify the provisions of the Conditional Order which provide for the modification of the stay if the following requirements are not met: (1) the Debtor must have paid his November, 1995 monthly mortgage payment by November 22, 1995 and his December, 1995 monthly mortgage payment by December 22, 1995; (2) the Debtor must have paid the post-petition mortgage arrearages incorrectly stated in the Conditional Order as being in the amount of $1,326.26, as well as $310.00 in attorney's fees and disbursements, by December

30, 1995; and 3) the Debtor must pay all monthly mortgage payments commencing January 1, 1996 when the same become due.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: October 11, 1996